Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

FILED
Dec 07 2011, 9:51 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

NATHANIEL JEFFERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1104-CR-165
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-1001-FA-2438

December 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Nathaniel Jeffers ("Jeffers") appeals after a jury trial from his convictions of and sentences for six counts of child molesting,[1] each as a Class A felony, one count of child molesting[2] as a Class C felony, and one count of battery[3] as a Class D felony. Jeffers presents the following restated issues for our review:

I. Whether the trial court's application of Indiana's Rape Shield Rule to this case violated Jeffers' right to confront the victim about other possible causes of her pregnancy and contraction of chlamydia;

II. Whether the trial court committed reversible error by denying Jeffers' motion for a mistrial after comments made by the State during closing argument;

III. Whether Jeffers' convictions for two counts of Class A felony child molesting by sexual intercourse violate double jeopardy principles; and

IV. Whether the trial court abused its discretion by imposing consecutive sentences.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2005, when A.P. was eight years old, she and her mother ("Mother"), a brother, and a sister, moved from East Chicago, Indiana, to Indianapolis. They first lived with Mother's brother, Terry Essex ("Essex"), and other family members in Essex's apartment at the Port-O-Call Apartments. By late 2005 to early 2006, Mother became romantically involved with Jeffers, who was at that time twenty-three years old. Jeffers also expressed a sexual interest

[1] *See* Ind. Code § 35-42-4-3(a).

[2] *See* Ind. Code § 35-42-4-3(b).

[3] *See* Ind. Code § 35-42-2-1.

in A.P. by winking at her and making "nasty" faces at her. *Tr.* at 87. During the winter of 2006, Jeffers told A.P., who at that time was nine years old, that he had heard that she liked him, and he kissed her. The next night at a party at Essex's apartment, Jeffers and A.P. went outdoors on an outside patio where Jeffers subjected A.P. to her first experience of sexual intercourse. Jeffers also directed A.P. to perform oral sex on him. A.P., who was bleeding from that first sexual encounter, returned to Mother's apartment at that complex and cleaned herself up. Jeffers came over to Mother's apartment later that evening with food, flowers, and a card for Mother, which he gave to her in front of A.P.

Jeffers and A.P. did not have contact with each other for approximately one year after that. During the summer of A.P.'s fourth grade school year, A.P. and Jeffers continued to have sexual intercourse until she went to East Chicago to spend the remainder of the summer with her father ("Father"). While living with Father in East Chicago, A.P. reported the inappropriate physical contact she had had with Jeffers, and A.P. was interviewed by police officers there. Mother drove to East Chicago, where she spoke with authorities about A.P.'s claims. While in the police station parking lot with A.P., Mother, who was very angry with A.P., smacked A.P. in the face. The investigation did not proceed any further at that time.

When A.P. returned home, Jeffers was living in Mother's home in a different apartment complex. Jeffers and A.P. continued to have a sexual intercourse from the fall of 2007 through the summer of 2008. Jeffers and A.P. had sexual intercourse so frequently that A.P. lost count of the actual number of times. Ultimately, Jeffers impregnated A.P. In November 2008, Mother took A.P. to an abortion clinic to terminate A.P.'s pregnancy. Mother instructed A.P. to tell the authorities that someone else, a teenager, was responsible

for the pregnancy. Although A.P. had been instructed not to have sexual relations for two weeks after her abortion, Jeffers engaged in sexual relations with A.P. during that time period.

From November 2008 until May 2009, Jeffers had no physical contact with A.P., but would telephone her to confirm that she was not engaging in sexual intercourse with anyone else. Jeffers returned during the summer of 2009, and he and A.P. resumed their sexual relationship on a daily basis. On one occasion when A.P. and Jeffers were having sexual intercourse on Mother's couch, Jeffers criticized A.P.'s sexual performance and compared her to Mother. A.P., who was upset, got up to leave, but Jeffers ordered her to return and continue engaging in sexual intercourse with him. A.P. and Jeffers argued, and then Jeffers struck A.P. with his closed fist with such force that she "saw stars." A.P.'s brother, who was home on that occasion, came downstairs after hearing A.P.'s screams and witnessed Jeffers striking A.P. A.P.'s brother attempted to stop the fight, but Jeffers struck him as well.

A.P. continued to have sexual intercourse with Jeffers until her fall break from school in 2009, when she was thirteen years old. The environment in Mother's home was turbulent. On October 25, 2009, Mother and A.P. became involved in an altercation, and law enforcement officers were called to the scene. A.P. spoke with a female officer who had formerly been a forensic child interviewer. A.P. told the officer that Jeffers had been engaging in sexual relations with her since she was nine years old, that she had had an abortion, and that Mother had directed her to lie about who had impregnated her. When Mother was informed that her children were going to be removed from her care, she became demonstrably angry with A.P. A.P. was forensically interviewed and examined at a hospital

where it was determined that she had contracted chlamydia. An investigating officer confirmed that A.P. had had an abortion in November 2008.

The State charged Jeffers with six counts of Class A felony child molesting, one count of Class C felony child molesting, three counts of Class D felony battery, and one count of Class D felony strangulation. Jeffers' jury trial was held on December 6-7, 2010, at the conclusion of which, the jury found Jeffers guilty of six counts of child molesting as Class A felonies, one count of child molesting as a Class C felony, and one count of battery as a Class D felony. The trial court sentenced Jeffers to an aggregate sentence of one hundred years executed. Jeffers now appeals. Additional facts will be supplied as necessary.

DISCUSSION AND DECISION

I. Indiana's Rape Shield Rule

Jeffers argues that the trial court improperly excluded evidence that A.P.'s pregnancy and her contraction of chlamydia could have been caused by someone else. In particular, Jeffers argues that he was denied his right to confront A.P. on those possible other causes, a right guaranteed by the Sixth Amendment to the United States Constitution. Jeffers contends that the trial court's application of Indiana's Rape Shield Law, incorporated in Indiana Rule of Evidence 412, denied him the opportunity to cross-examine A.P. about whether Essex had molested her.

"The purpose of cross-examination is to expose possible biases, prejudices, or ulterior motives related to the case." *Morrison v. State*, 613 N.E.2d 865, 867 (Ind. Ct. App. 1993), *trans. denied*. But, as with the admission or exclusion of all evidence, a trial court's limitation on the scope of cross-examination is reviewable only for an abuse of discretion.

See id.; Zemco Mfg., Inc. v. Pecoraro, 703 N.E.2d 1064, 1069 (Ind. Ct. App. 1998), *trans. denied.* A trial court abuses its discretion when it takes action that is clearly erroneous or against the logic and effect of the facts and circumstances before it. *Zemco*, 703 N.E.2d at 1069.

Our Supreme Court has explained that Indiana Evidence Rule 412, commonly referred to as the Rape Shield Rule, is the embodiment of the following basic principles of Indiana's Rape Shield Statute, Indiana Code section 35-37-4-4:

> [I]nquiry into a victim's prior sexual activity is sufficiently problematic that it should not be permitted to become the focus of the defense. Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes. Consequently, "[t]he Rule does not permit the trial to stray from the central issue of guilt or innocence of the defendant into a full-scale investigation of charges made by the prosecutrix against other persons."

State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (alteration in original, internal citations omitted). In particular, Evidence Rule 412 prohibits the introduction of evidence of the past sexual conduct of a victim or witness in a prosecution for a sex crime, with certain exceptions. The exception at issue here allows "evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded." Ind. Evidence Rule 412(a)(2); *cf. Oatts v. State*, 899 N.E.2d 714, 722 (Ind. Ct. App. 2009) (explaining that Rape Shield Rule must yield to defendant's Sixth Amendment right to conduct full, adequate, and effective cross-examination to extent Rule would otherwise limit "evidence . . . offered not to show the victim's consent but to establish some other point such as that an injury could have been inflicted by someone other than the defendant.").

Furthermore, once the State has introduced evidence corroborating that the victim has been subject to sexual contact, the victim's credibility is automatically bolstered in regard to the correctness of the victim's identification of the perpetrator. *See Steward v. State*, 636 N.E.2d 143, 149 (Ind. Ct. App. 1994) (discussing risk of mistaken identification of perpetrator through partial corroboration). The partial corroboration exception has been described as follows:

> In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." This bolstering evidence invites the inference that because the victim was accurate in stating that sexual contact occurred, the victim must be accurate in stating that the defendant was the perpetrator. Therefore, in such cases, the defendant must be allowed to rebut this inference by adducing evidence that another person was the perpetrator. . . . Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue.

Redding v. State, 844 N.E.2d 1067, 1070-71 (Ind. Ct. App. 2006) (quoting *Turney v. State*, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001)).

Jeffers contends that, once the State introduced evidence of A.P.'s pregnancy, which was ultimately terminated, and her contraction of chlamydia, he was entitled to cross-examine A.P. about allegations that Essex had molested A.P. This argument fails for several reasons.

Under Evidence Rule 412(b)(1), a party who seeks to offer evidence under the rule must file a written motion at least ten days prior to trial describing the evidence. The motion may be filed less than ten days prior to trial upon a showing of good cause. Evid. R. 412(b)(1). Jeffers did not file such a motion ten days prior to trial, but argued that Essex had

been uncooperative with Jeffers' deposition requests. Allegations had been made long before trial that Essex had also molested A.P. Prior to trial, the State represented to the trial court that the allegations were apparently unfounded as no charges would be filed against Essex. Additionally, a witness may assert a claim of Fifth Amendment privilege at a deposition. *In re Kefalidis*, 714 N.E.2d 243, 250 (Ind. Ct. App. 1999). Consequently, there is no reversible error here, as Jeffers failed to file a pre-trial motion, and did not establish good cause for a later filing of such motion.

Furthermore, Jeffers failed to make an offer of proof at trial regarding what witnesses or evidence he would present in support of his allegations that Essex was the perpetrator, after the State presented evidence of A.P.'s pregnancy, abortion, and contraction of a sexually transmitted disease. "A pre-trial ruling on a motion in limine is appropriate to determine the admissibility of evidence outside of the jury's hearing in order to avoid prejudice." *Miller v. State*, 716 N.E.2d 367, 370 (Ind. 1999). In order to preserve appellate review of the issue, a party must do more than challenge the ruling on a motion in limine. *Id*. The evidence must be offered at trial to give the trial court the opportunity to rule on the admissibility of such evidence at that time. *Id*. "This requirement has been explicitly held applicable to exclusions under the Rape Shield doctrine, even though Rule 412 and the Rape Shield Law include specific provisions for ruling on the admissibility of the proposed evidence after pretrial notice and hearing." *Id*. Jeffers has failed to preserve this issue for appellate review.

Jeffers seeks to avoid such waiver by claiming that the trial court's exclusion of the evidence constituted fundamental error. The doctrine of fundamental error permits appellate

consideration of alleged errors to which no objection was made at trial. *Stewart v. State*, 567 N.E.2d 171, 174 (Ind. Ct. App. 1991). The fact that error occurred and that it was prejudicial will not suffice in that situation, as such is the case for reversible error where an objection has been made. *Id.* Instead, the error must be such that there has been "a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005).

Jeffers claims that he was entitled to cross-examine A.P. on the issue of whether Essex had molested her, because the State had offered partial corroboration evidence, i.e., A.P.'s pregnancy, abortion, and contraction of chlamydia. Jeffers' argument fails because the partial corroboration exception is inapplicable here. *See Turner v. State*, 720 N.E.2d 440, 445-46 (Ind. Ct. App. 1999) (exception inapplicable where no evidence victim was confused as to perpetrator's identity); *Kielblock v. State*, 627 N.E.2d 816, 820 (Ind. Ct. App. 1994) (exception inapplicable where victim consistently accused defendant of molestation and identified him in court). A.P. was not confused as to the identity of the perpetrator. A.P. testified that she told authorities in East Chicago that Jeffers had molested her. She stated that she knew that Jeffers was the father of her baby even though she had been instructed by Mother to say that someone else was the father. A.P. identified Jeffers to a female police officer as the man who had been having sexual intercourse with her since she was nine years old and who had impregnated her. She identified him at trial as the man who had molested her and had beaten her.

Jeffers was allowed to cross-examine A.P. about the amount of time she spent at Essex's house, that she had lied about the identity of her baby's father, and that she had failed to disclose the allegations of molestation for a long time. A.P. testified at trial that Jeffers called her to make sure she was not engaging in sexual intercourse with anyone else. She also testified that she was certain Jeffers was the father of her baby because she was not engaging in sexual intercourse with anyone else. Since the partial corroboration exception is inapplicable here, Jeffers has failed to establish fundamental error. The trial court did not abuse its discretion by limiting Jeffers' cross-examination of A.P., especially where we are left to speculate as to the evidence he believed he would elicit.

II. Motion For Mistrial

Jeffers also argues that the trial court committed reversible error by denying his motion for mistrial made after the State's closing, rebuttal argument. The State made the following argument:

> STATE: And you know she was having sex with [Jeffers]. There has been no evidence of any other person, and Mr. - -
>
> [DEFENSE:] Objection. May we approach the bench?
>
> [STATE:] The player that's sleeping around town, that catches chlamydia and gives it to a 14-year-old.
>
> THE COURT: Overruled. You may continue.
>
> [STATE:] That's the player, because she was the one sleeping with the women all over town? No, it was him, and he got chlamydia and he gave it to a 12-year-old, or a 13-year-old, excuse me. Where do you think she got chlamydia? Where do you think she got pregnant?
>
> * * *

> [STATE:] What I'm going to give you is A.P. What I can give to you is the people who knew her and cared about her. Well, what have they brought you? What have they done?

Tr. at 338-40. Jeffers waited until the conclusion of the State's closing, rebuttal argument to move for a mistrial. The trial court denied the motion and asked Jeffers' counsel if there was a lesser remedy he would like to request. Jeffers' counsel declined the trial court's offer.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004). If the party is not satisfied with the admonishment, then he or she should move for a mistrial. *Id*. The grant of a motion for mistrial is an extreme remedy warranted only when less severe remedies will not satisfactorily correct the error. *Owens v. State*, 937 N.E.2d 880, 895 (Ind. Ct. App. 2010). The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. *Id*. "On appeal, the trial judge's discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury." *Id*. (quoting *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004), *cert. denied*, 546 U.S. 831 (2005)). "When determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of grave peril to which he should not have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." *Id*. (quoting *James v. State*, 613 N.E.2d 15, 22 (Ind. 1993)).

"A timely and accurate admonition is presumed to cure any error in the admission of evidence." *Heavrin v. State*, 675 N.E.2d 1075, 1084 (Ind. 1996) (quotation omitted). The

refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of the motion. *Boyd v. State*, 430 N.E.2d 1146, 1149 (Ind. 1982). Jeffers' counsel did immediately object to the State's argument, but the trial court overruled the objection, and the State's argument continued. At the conclusion of the arguments, Jeffers' counsel moved for a mistrial, which was denied by the trial court. The trial court asked if Jeffers was requesting any lesser remedy, and Jeffers' counsel indicated that he was not. Arguably, review of the merits of the trial court's ruling has been waived.

Potential waiver notwithstanding, Jeffers' argument on the merits fails. The State's brief comment about the lack of evidence of "any other person" is troubling, especially in light of the State's position on its motion in limine regarding the admissibility of evidence of any other person. However, we agree with the trial court that the statement did not place Jeffers in a position of grave peril to which he should not have been subjected. The jury heard A.P.'s unequivocal testimony that Jeffers was the individual who repeatedly engaged in sexual intercourse with her, that she was certain he was the father of her baby, and that she had contracted a sexually transmitted disease. A.P. was allowed to testify without objection that she knew Jeffers was the father of her baby because she was not having sexual intercourse with anyone else, and that Jeffers would telephone her to confirm that she was not having sexual intercourse with anyone else. Jeffers challenged her credibility on cross-examination. Additionally, Jeffers testified in his own defense, denying any kind of sexual relationship with A.P. His defense theory was to portray himself as an adult male who had many girlfriends, including Mother, i.e., he was "a player," and would not have had any interest in engaging in a sexual relationship with such a young girl. Based on the record

before us, we find that the trial court did not abuse its discretion by denying the motion for mistrial.

III. Double Jeopardy

Jeffers contends that his two convictions for Class A felony child molesting by sexual intercourse violate double jeopardy principles. He claims that the two convictions violate the same elements test because the offenses were charged identically.

The *Blockburger* "same elements" test provides as follows:

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.

Blockburger v. U.S., 284 U.S. 299, 304 (1932). We interpret the Indiana Constitutional "statutory elements" test of the same offense analysis in the same fashion as the *Blockburger* "same elements" test. *Richardson v. State*, 717 N.E.2d 32, 50 n.41 (Ind. 1999). However, "[i]n cases, where, as here, a double jeopardy challenge is premised upon convictions of multiple counts of the same offense, the statutory elements test is inapplicable, because a defendant may be charged with as many counts of an offense as there are separate acts committed." *Peckinpaugh v. State*, 743 N.E.2d 1238, 1242 (Ind. Ct. App. 2001).

Our Supreme Court has stated the following:

> When separate and distinct offenses occur, even when they are similar acts done many times to the same victim, they are chargeable individually as separate and distinct criminal conduct. . . . We do not approve any principle which exempts one from prosecution from all the crimes he commits because he sees fit to compound or multiply them. Such a principle would encourage the compounding and viciousness of the criminal acts.

Brown v. State, 459 N.E.2d 376, 378 (Ind. 1984). Counts IV and V each alleged that Jeffers knowingly performed sexual intercourse with A.P. when A.P. was under fourteen years of age and while Jeffers was at least twenty-one years of age between September 28, 2006 and September 28, 2008. Indiana Code section 35-42-4-3 provides that it is a Class A felony if a person, who is at least twenty-one years of age, performs or submits to sexual intercourse or deviate sexual conduct with a child who is under fourteen years of age. "The classic test for multiplicity is whether the legislature intended to punish individual acts separately or to punish the course of action which they make up." *Pontius v. State*, 930 N.E.2d 1212, 1216 (Ind. Ct. App. 2010).

Here, there was no single act or transaction from which multiple offenses were charged, but repeated identical acts over the course of time against the same victim leading to multiple charges. A.P. testified that she lost track of the frequency with which she and Jeffers engaged in sexual intercourse because the offenses were committed on an almost daily basis. The fact that Counts IV and V are identically worded and cover the same time period does not establish a violation of either the state or federal double jeopardy provisions in this case.

IV. Sentencing

Jeffers asserts that the trial court abused its discretion by sentencing him to four, twenty-five year consecutive terms based upon a single, improper aggravating circumstance. Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial

court's reasons for imposing a particular sentence. *Id*. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*.

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id*. Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if any, but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors. *Id*. at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then "impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana." Ind. Code § 35-38-1-7.1(d).

In particular, Jeffers asserts that the trial court abused its discretion by considering a material element of an offense as an aggravating circumstance. He claims that the trial court

erred by considering as an aggravating factor that Jeffers continued to have sexual intercourse with A.P. after she became pregnant and had an abortion. We disagree with Jeffers' characterization of the trial court's sentencing statement.

The trial court stated as follows during sentencing:

> I think you did manipulate a situation. . . . I think you treat people differently depending on where they stand in your life and I do think it's reflective of a manipulative personality and I think A[.]P[.] fell under that control and you ran with that as long as you could. I think it's heinous that we had a 12 year old get pregnant and even after that pregnancy was aborted the issue didn't stop--the issue continued and the acts continued and I do find that to be aggravating under these circumstances.

Tr. at 385-86. Jeffers claims that the sexual intercourse referred to by the trial court was the subject of Counts VIII and XI, counts which resulted in convictions. He contends that the trial court abused its discretion by using a material element of an offense as an aggravating circumstance.

The record reflects that A.P. became pregnant and had an abortion in November 2008. The offenses charged in Counts VIII and XI alleged that Jeffers engaged in sexual intercourse with A.P. from July 2008 to late October 2009, clearly after A.P.'s pregnancy and abortion. However, the manipulation and control used by Jeffers to secure A.P.'s continued participation in the sexual intercourse is not a material element of the felony offenses with which he was charged and of which he was convicted. Indiana Code section 35-42-4-3 does not contain manipulation of the victim, impregnation of the victim, or continued post-abortion sexual activity with the victim, as elements of the offense. "[T]he particularized individual circumstances of the criminal act may constitute a separate aggravating circumstance." *Ector v. State*, 639 N.E.2d 1014, 1015 (Ind. 1994). The trial court correctly

relied upon the nature and circumstances of the crime in ordering consecutive sentences here and adequately described why Jeffers deserved an enhanced sentence in this situation. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006).

Affirmed.

BAKER, J., and BROWN, J., concur.